

Supreme Court of the United States

OCTOBER TERM, 1965

No. 645

UNITED STATES, PETITIONER

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

INDEX

Original Print

Record from the Superior Court of New Jersey, Appellate Division, consisting of Appendix to Brief of Plaintiff-Appellant filed in that Court incorporating portions of record from Superior Court, Chancery Division of Bergen County

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION.

* * * * Civil Action.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED
STATES, a corporation of the State of New York,
PLAINTIFF-APPELLANT

vs.

ALBERT BAGIN (a/k/a Alben Bagin), et al.,
DEFENDANTS-RESPONDENTS

On Appeal from Superior Court Chancery Division
Bergen County

Sat Below:

Pashman, J.S.C.

APPENDIX FOR PLAINTIFF-APPELLANT

* * * *

[fol. 1]

IN THE SUPERIOR COURT OF BERGEN COUNTY,
NEW JERSEY

COMPLAINT—Filed June 4, 1963

* * * * FIRST COUNT

1. On December 13, 1960, Albert Bagin and Erika Bagin, his wife, being indebted to plaintiff in the sum of \$30,000, executed to it a bond of that date to secure that sum with interest at the rate of 6% per annum, payable in 336 successive monthly instalments due and payable on the first day of each month commencing February 1, 1961.

2. To secure the payment of the bond, the said Albert Bagin and Erika Bagin, his wife, executed to plaintiff a mortgage of even date with the bond, and thereby conveyed to it in fee the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond and mortgage. The said mortgage was duly recorded in the Clerk's office of Bergen County at 11:51 a.m. on December 19, 1960, in Book 3651 of Mortgages for said county, at page 285.

4. The mortgage contained an agreement that if any instalment of principal and interest should remain unpaid for 30 days after the same should fall due, the whole of the principal sum then unpaid, together with all unpaid interest, should, at the opinion of the mortgagee, become immediately due.

6. On March 1, 1963, defendants Albert Bagin and Erika Bagin, his wife, failed to pay the monthly instalment of principal and interest due on said date and the [fol. 2] said monthly instalment has remained unpaid for more than 30 days. Said defendants have failed and neglected to pay any monthly instalments, or any portion

thereof, since February 1, 1963, to the date hereof. Plaintiff has, therefore, elected that the whole principal sum with all unpaid interest and all additions thereto, as provided by the mortgage and alleged in this complaint, is now due.

* * *

9. On December 13, 1960, defendants Albert Bagin and Erika Bagin, his wife, gave a mortgage to Wulster Built Homes, Inc., a New Jersey corporation, which mortgage was recorded at 1:58 p.m. on December 19, 1960, in Book 3651 of Mortgages for Bergen County at page 399. This mortgage covers the premises in the Borough of Upper Saddle River, Bergen County, New Jersey, described in paragraph 3 hereof, and was allegedly given to secure an indebtedness in the amount of \$6,000.00. By an instrument dated January 17, 1961, and recorded January 17, 1961, in Book 523 of Assignments of Mortgages at page 298, Wulster Built Homes, Inc., a New Jersey corporation, assigned said mortgage to defendant William Hawkey.

* * *

11. Defendant Albert Bagin is also known as Alben Bagin.

12. On March 21, 1962, defendant United States of America filed a notice of Federal Lien, dated March 19, 1962, in the office of the Clerk of Bergen County against, *inter alia*, Alben Bagin for withholding taxes of \$7,748.91. The notice was recorded in Book 27 of Federal Liens at page 572.

13. Any interest, lien, or encumbrance which any of the foregoing named defendants has or claims to have in or upon the mortgaged premises, or any part thereof, is subject to the lien of plaintiff's mortgage.

* * *

[fol. 3]

IN THE SUPERIOR COURT OF BERGEN COUNTY

ANSWER. Filed by Defendant William Hawkey
Served June 21, 1963

* * * * *

(Admits allegations of paragraphs 3, 9, and 13 of the First Count of the Complaint and all allegations of the Second Count. Defendant has no knowledge or information sufficient to form a belief as to the other allegations of the Complaint.)

WHEREFORE, this defendant joins in the demand of the plaintiff for judgment and also demands that such judgment shall fix the amount due to him on his mortgage, and that he be paid the amount so fixed with interest and costs, and that the lands be sold to satisfy such amount as well as the amount due to the plaintiff.

* * * * *

IN THE SUPERIOR COURT OF BERGEN COUNTY

ANSWER. Filed by Defendant United States of America.
Served, with a Stipulation Extending Time to Answer,
August 26, 1963

* * * * *

This defendant, which has been made a defendant as a subsequent encumbrancer in the above cause, does not dispute the priority of the plaintiff's mortgage as stated in the complaint filed in this cause, except that the defendant disputes the priority of counsel fees and of any advances whatsoever made after the assessment dates of the lien of the United States, and says there is due to it on its Federal Tax Lein set forth in paragraph No. 12 of said complaint the sum of \$7,708.91, together with penalties and interest.

[fol. 4] The defendant reserves the right to redeem within one year of the date of sale, as provided by 28

U.S.C. Section 2410, and requests that its encumbrance be reported upon.

* * * * *

MOTION.

Argued December 13, 1963.

IN THE SUPERIOR COURT OF BERGEN COUNTY

OPINION.—Decided January 9, 1964, Amended
March 9, 1964.

This is a motion for summary judgment and to settle the form of judgment in a suit to foreclose a mortgage. The mortgage covering premises in the Borough of Upper Saddle River was executed by defendants Albert and Erika Bagin to plaintiff on December 13, 1960 and recorded in the Bergen County Clerk's office on December 19, 1960 at 11:51 A.M. These defendants also executed a mortgage to Wulster Built Homes, Inc., which was recorded at 1:58 P.M. on December 19, 1960. By an assignment dated and recorded January 17, 1961 Wulster Built Homes, Inc. assigned its mortgage to defendant William Hawkey.

On March 20, 1961 a third mortgage covering the Upper Saddle River premises was given by defendants Bagin to defendants Merle B. Kenwood and Rose B. Rosenthal, t/a Charles & Co. This mortgage was recorded on May 18, 1961.

On March 21, 1962 the defendant United States of America filed a notice of federal tax lien, dated March 19, 1962, in the office of the Clerk of Bergen County, against, *inter alia*, Alben Bagin for withholding taxes due in the sum of \$7,748.91.

Defaults have been entered against the defendants Albert and Erika Bagin and Merle B. Kenwood and Rose B. Rosenthal, t/a Charles & Co.

[fol. 5] Plaintiff contends that it is entitled to possession, foreclosure of the mortgage, and a sheriff's sale of the property due to the default of defendants Bagin under the terms of the mortgage. Plaintiff alleges that

\$30,052.14 is due on the mortgage plus interest from September 6, 1963 and costs including a counsel fee under R. R. 4:55-7(c). Defendant Hawkey does not dispute plaintiff's priority and asks that the amount due to him be reported on. Plaintiff contends that the sum of \$5,104 plus interest from September 1, 1963 is due to defendant Hawkey.

The United States of America does not dispute the priority of either of these two mortgages as to principal and interest but contends that the Federal Government's tax lien has priority over the allowance to the mortgagees of counsel fees and any advancements for real estate taxes and/or insurance premiums made after the assessment of the tax lien. The basis of these contentions is two recent decisions by the United States Supreme Court in *United States v. Buffalo Savings Bank*, 371 U.S. 228, 83 S. Ct. 314 (1963) and *United States v. Pioneer American Insurance Company*, 374 U.S. 84, 83 S. Ct. 1651 (1963).

The pleadings and affidavits on file show palpably that there is no genuine issue as to any material fact. There is no need for a plenary trial and the proofs clearly indicate that plaintiff is entitled to a summary judgment of foreclosure as a matter of law. See R. R. 4:58-3; *United Advertising Corp. v. Metuchen*, 35 N. J. 193 (1961); *Bouley v. Borough of Bradley Beach*, 42 N. J. Super. 159, 168 (App. Div. 1956); *Devlin v. Surgent*, 18 N. J. 148 (1955).

The lien of the United States for unpaid taxes arose under 26 U.S.C.A. § 6321 and is a lien "upon all property and rights to property, whether real or personal," belonging to the taxpayer Albert Bagin. By virtue of 26 U.S.C.A. § 6322, a federal tax lien arises at the time of assessment. The mortgages were prior in time to the tax [fol. 6] lien and generally speaking they have priority as to principal and interest due. See 26 U.S.C.A. §§ 6322, 6323; N.J.S.A. 46:16-13.

The dispute concerning the priority of counsel fees and any advancements for taxes and insurance payments is solely a question of law and may be decided on a motion for summary judgment.

Counsel for plaintiff, in support of its position, has presented the court with the transcript of a recent, unreported decision of another Chancery vicinage in this State which held that counsel fees allowed by our court rules and advances for local property taxes in an action to foreclose a mortgage have priority over a subsequently filed federal tax lien.

The Federal Government contends, although diligent research on the part of counsel and this court has failed to find a reported decision on point, that the courts of this State have been deciding these questions contrary to the dictates of the United States Supreme Court.

In *United States v. Buffalo Savings Bank, supra*, the court, in a mortgage foreclosure action where federal tax liens arose after the mortgage, in reliance upon *United States v. City of New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954) held:

"* * * that federal tax liens have priority over subsequently accruing liens for local real estate taxes, even though the burden of the local taxes in the event of a shortage would fall upon the mortgagee whose claim under state law is subordinate to local tax liens." 83 S. Ct. at p. 315.

The court has examined the case of *United States v. Pioneer American Insurance Co., supra*, where a provision for "a reasonable attorney's fee" was incorporated into [fol. 7] the mortgage which was being foreclosed. The court, once again relying on *United States v. City of New Britain, supra* and other cases which discuss the choate lien test held that the claim for attorney's fees remained inchoate until finally fixed in amount in the mortgage foreclosure decree. Based upon this reasoning, the court held the claim for attorney's fees to be subordinate to federal tax liens. The same reasoning would clearly be applicable to our R. R. 4:55-7(c) which provides for counsel fees in a mortgage foreclosure action.

Since it is well settled that the priority of federal tax liens against competing claimants and lienors is to be determined by federal law, *United States v. City of New Britain, supra*; *United States v. Acri*, 348 U.S. 211, 75

S. Ct. 239, 99 L. Ed. 264 (1955), this court holds that it is bound by the decision in *United States v. Pioneer American Insurance Co.*, *supra* and not at all bound by the unreported Chancery decision cited by plaintiff.

The plaintiff contends that there were no advances for taxes or insurance payments. Thus it is not necessary to decide the question of priority concerning these types of advances although the *Buffalo Savings Bank* case, *supra*, is clear on the question of property tax liens arising subsequent to the filing of a federal tax lien.

Counsel have agreed to settle between them any problem arising out of the fact that the property was held as a tenancy by the entirety and the federal tax lien was against the husband alone. Thus, the issues which might arise because of these facts are not before the court.

Based upon the foregoing plaintiff is entitled to partial summary judgment as follows:

- (1) The sum of \$30,052.14 due on its mortgage plus costs and lawful interest from September 6, 1963.
- [fol. 8] (2) The lands are to be sold according to law to satisfy the amount due to plaintiff.
- (3) Plaintiff is entitled to possession of the lands from defendants Bagin or anyone holding same under them.
- (4) Defendant William Hawkey is entitled to \$5,104 due on his mortgage plus lawful interest from September 6, 1963.
- (5) Any counsel fee awarded plaintiff pursuant to R. R. 4:55-7(e) shall be paid in a manner not inconsistent with this opinion at a surplus money proceeding, if any.
- (6) All defendants are barred and foreclosed of all equity of redemption in and to said lands, except that the United States of America retains its right to redeem pursuant to 28 U.S.C.A. § 2410.

The order of priority of payment of liens is as follows:

1. First mortgage plus interest from September 6, 1963 and costs.

2. Second mortgage plus interest from September 6, 1963.
3. Lien of United States Government.
4. Counsel fee due under the Rules of court and advances made by virtue of first mortgage.

The third mortgagee filed no answer. A default has been entered against it. Said mortgagee will be limited to its priority in surplus money proceedings.

Counsel may present a form of judgment pursuant to R. R. 4:55-1.

[fol. 9]

IN THE SUPERIOR COURT OF BERGEN COUNTY

FINAL JUDGMENT. Entered April 6, 1964.

* * * *

This matter having been presented to the court on plaintiff's motion for summary judgment and to settle the form of judgment, Frank W. Hoak appearing for Donald B. Jones, attorney for plaintiff, Martin Tuman appearing for David M. Satz, Jr., United States Attorney, and the court having read and considered the briefs submitted and having heard and considered the arguments of counsel, and having rendered a written opinion dated January 9, 1964;

And it appearing that summons and complaint has been duly issued and returned served upon all the defendants, and default having been taken against all defendants except William Hawkey, who has filed an answer which does not dispute the priority of the plaintiff's mortgage, but requests that his lien be reported upon, and except the United States of America, which has filed an answer that does not dispute the priority of the plaintiff's mortgage but disputes the priority of counsel fees and of any advances whatsoever made after the assessment dates of the lien of the United States; and the plaintiff's bond and mortgage, and the notes mortgage, and assignment of mortgage held by the defendant William Hawkey, having been produced and marked as exhibits by the court.

And it appearing from the affidavits filed herein that there is due to the plaintiff for the principal and interest on its mortgage described in the complaint the sum of \$30,052.14; and that there is due to the defendant William Hawkey for the principal and interest on his mortgage described in the complaint the sum of \$5,104.00; no proof by way of an affidavit being submitted on behalf of the defendant United States of America.

And the court having found that the pleadings and affidavits on file show palpably that there is no genuine [fol. 10] issue as to any material fact, that there is no need for a plenary trial, and that the proofs clearly indicate that plaintiff is entitled to a summary judgment of foreclosure as a matter of law.

And the court having determined that it is not necessary to decide the question of priority concerning advances for taxes or insurance payments because plaintiff contends that there were no advances for taxes or insurance payments;

And the court having determined that the issues which might arise because the property was held as a tenancy by the entirety and the federal tax lien was against the husband alone are not before the court, because counsel have agreed to settle between them any problem arising out of these facts.

And the court having determined that plaintiff is entitled to partial summary judgment as follows:

(1) The sum of \$30,052.14 due on its mortgage plus costs and lawful interest from September 6, 1963.

(2) The lands are to be sold according to law to satisfy the amount due to plaintiff.

(3) Plaintiff is entitled to possession of the lands from defendants Bagin or anyone holding same under them.

(4) Defendant William Hawkey is entitled to \$5,104 due on his mortgage plus lawful interest from September 1, 1963, and costs.

(5) Any counsel fee awarded plaintiff pursuant to R. R. 4:55-7(c) shall be paid in a manner not inconsistent with the court's opinion, dated January 9, 1964, at a surplus money proceeding, if any.

(6) All defendants are barred and foreclosed of all equity of redemption in and to said lands, except that the [fol. 11] United States of America retains its right to redeem pursuant to 28 U.S.C.A. § 2410.

And the court having determined that the order of priority of payment of liens is as follows:

1. First mortgage plus interest from September 6, 1963, and costs.
2. Second mortgage plus interest from September 1, 1963, and costs.
3. Lien of United States Government.
4. Counsel fee due under the Rules of court and advances made by virtue of first mortgage.

The third mortgagee, Merle B. Kenwood and Rose B. Rosenthal, t/a Charles & Co., having filed no answer and having had default entered against it will be limited to its priority to be established at a surplus money proceeding, if any.

It is, on this 6th day of April, 1964, ORDERED and ADJUDGED, first, that the plaintiff is entitled to have the sum of \$30,052.14, together with lawful interest thereon to be computed from September 6, 1963, together with costs of this suit to be taxed, including a counsel fee of \$425.52 which is hereby allowed to plaintiff pursuant to R. R. 4:55-7(c), raised and paid out of the mortgaged premises described in the complaint; second, that the defendant William Hawkey is entitled to have the sum of \$5,104.00, together with lawful interest thereon to be computed from September 1, 1963, together with costs of this suit to be taxed, raised and paid out of the mortgaged premises described in the complaint.

And it is further ORDERED and ADJUDGED that so much of the said mortgaged premises as will be sufficient to raise and satisfy the said mortgage, interest, and costs of the plaintiff, and the said mortgage, interest, and costs of [fol. 12] the defendant William Hawkey, be sold, and that an execution do issue for that purpose out of this court, directed to the Sheriff of the County of Bergen, commanding him to make sale, according to law, of so much of the mortgaged premises as will be sufficient to satisfy

first, the said mortgage, interest, and costs of the plaintiff, and second, the said mortgage, interest, and costs of the defendant William Hawkey; and that he first pay out of the proceeds of the sale to the plaintiff or its attorney the sum of \$30,052.14, together with interest as aforesaid and costs exclusive of the counsel fee, and second that he pay out of the proceeds of the sale to the defendant William Hawkey or his attorney the sum of 5,104.00, together with interest as aforesaid and costs; and that in case there is a surplus, the same shall be brought into this court and deposited with the clerk, subject to the order of this court; and that said sheriff make his report to this court of the sale as required by the rules of this court;

And it is further ORDERED and ADJUDGED that the plaintiff duly recover against the defendants Albert Bagin (a/k/a Alben Bagin) and Erika Bagin, his wife, or any one holding under them, possession of the premises mentioned and described in the complaint with the appurtenances and that an execution issue thereon.

And it is further ORDERED and ADJUDGED that all of the defendants to this action, and each of them, stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to so much of the mortgaged premises as shall be sold as aforesaid under this judgment, except United States of America reserves the [fol. 13] right to redeem within one year of the date of the sale as provided by 28 U.S.C. Section 2410.

MORRIS PASHMAN, J.S.C.
J.S.C.

We hereby consent to the form of this Final Judgment.

DAVID M. SATZ
United States Attorney
DAVID M. SATZ JR.

by: MARTIN G. HOLLERAN
Assistant U.S. Attorney

DAVID A. GELBER
Attorney for Defendant
WILLIAM HAWKEY

[fol. 14]

IN THE SUPERIOR COURT OF BERGEN COUNTY

NOTICE OF APPEAL.—Filed April 9, 1964

Notice is hereby given that plaintiff, The Equitable Life Assurance Society of the United States, a corporation of the State of New York, appeals to the Superior Court, Appellant Division, from that part of the Final Judgment entered in the above entitled action by the Superior Court, Chancery Division, on April 6, 1964, that provides for the priority of liens, other than the provision for the lien of the first mortgage plus interest from September 6, 1963, and costs.

[fol. 15]

IN THE SUPREME COURT OF NEW JERSEY

No. A-47, September Term, 1964

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a corporation of the State of New York,
PLAINTIFF-APPELLANT

vs.

ALBERT BAGIN (a/k/a Alben Bagin), et al.,
DEFENDANTS-RESPONDENTS

Mr. Frank W. Hoak argued the cause for the plaintiff-appellant (*Mr. Donald B. Jones*, attorney).

Mr. Edward J. Turnbach, Assistant United States Attorney, argued the cause for the defendant-respondent United States of America (*Mr. David M. Satz, Jr.*, United States Attorney, attorney; *Mr. Martin G. Holleran*, Assistant United States Attorney, on the brief).

OPINION PER CURIAM:—July 6, 1965

The plaintiff, The Equitable Life Assurance Society of the United States, held a \$30,000 first mortgage and an

accompanying bond which were executed, on December 19, 1960, by the defendants Albert Bagin and Erika Bagin, his wife. Upon default, the plaintiff filed a foreclosure complaint setting forth the execution of the bond and mortgage, the execution by the Bagins of a second mortgage dated December 19, 1960 and held by William Hawkey, and the filing by the United States, on March 21, 1962, of notice of a \$7,748.91 federal lien for withholding taxes. See 26 U.S.C.A. §§ 6321-6323. The defendant Hawkey filed an answer joining in the plaintiff's demand [fol. 16] for judgment and demanding that the amount due on his mortgage be fixed and that the lands be sold to satisfy that amount as well as the amount due to the plaintiff. The defendant United States filed an answer in which it requested that its encumbrance be reported on.

On motion, the Chancery Division determined that the plaintiff was entitled to the sum of \$30,052.14 plus interest, and also to taxed costs which amounted to \$630.30, inclusive of the fee of \$425.52 provided for in R.R. 4:55-7(c); the sum due the defendant Hawkey was determined to be \$5,104 plus interest, and taxed costs which amounted to \$25. The United States expressly conceded the propriety of the mortgages including principal, interest and taxed costs, exclusive, however, of the \$425.52 item. With respect to that item it contended that the plaintiff was not entitled to priority under the principles expressed by the Supreme Court in *United States v. Pioneer American Ins. Co.*, 374 U.S. 84, 10 L.Ed.2d 770 (1963) and *United States v. Buffalo Savings Bank*, 371 U.S. 228, 9 L.Ed. 2d 283 (1963). The Chancery Division agreed with its contention, and entered an order of priority of payment of liens which deferred the \$425.52 item until after payment of both mortgages and the lien of the United States. Without awaiting the sale of the property, the plaintiff appealed to the Appellate Division and before argument there we certified.

After hearing oral argument we directed that the sale of the property be proceeded with. This has been done and the net sum (after payment of the fees and commissions due to the sheriff and clerk) now in hand for

distribution is \$39,193.31. The plaintiff contends that its priority includes the \$425.52 item and that consequently the order of distribution should be as follows: to the [fol. 17] first mortgagee, \$30,052.14 plus interest of \$2,830.58 plus taxed costs of \$630.30—total \$33,513.02; to the second mortgagee, \$5,104 plus interest of \$485.12 plus taxed costs of \$25—total \$5,614.12; to the United States the balance of \$66.17. On the other hand, the United States contends that the first mortgagee's priority as against it does not include the \$425.52 item and that distribution should be made by providing "for a priority adjustment fund consisting of the principal and interest, plus costs, of the two prior mortgages to be distributed in accordance with state law, but the surplus, if any, representing the Taxpayer's interest in the property at the time the federal tax lien arose, should be applied to the federal tax lien in full." Under this approach the fund would consist of \$33,087.50 for the first mortgagee, \$5,614.12 for the second mortgagee, and a surplus of \$491.69 for the United States, with the State remaining at liberty, however, to decide under its own laws that the \$425.52 be paid to the plaintiff by reducing the second mortgagee's judgment in that amount.

Taxed costs are traditional and incidental allowances which are of some help in defraying portions of the heavy expenses of litigation incurred by the prevailing parties. They are of long usage and are generally provided for by statutes and court rules. In the federal courts they include (28 U.S.C.A. § 1920) such items as fees of the clerk, marshal, court reporter and witnesses, printing costs, and "attorney's and proctor's docket fees." This last item is specifically governed by 28 U.S.C.A. § 1923 and, while the amounts listed there are meager, they occasionally add up to more significant sums. See, e.g., *Missouri v. Illinois*, 202 U.S. 598, 50 L.Ed. 1160 (1906) [fol. 18] where the taxed costs included \$720 for "solicitors' fees, viz., \$20 for attendance at final hearing and \$2.50 for each deposition taken and admitted in evidence." Under various federal statutory provisions further allowances for attorneys' fees may be made and included in the taxed costs. See Peck, *Taxation of Costs*

in *United States District Courts*, 42 *Neb.L.Rev.* 788, 799 (1963); 6 *Moore's Federal Practice* par. 54.71 (2d ed. 1953).

In the state courts, taxed costs are generally dealt with in similar fashion. See 20 *Am.Jur. 2d, Costs*, § 5 *et seq.* (1965); 4 *Utah L.Rev.* 501 (1955); 5 *N.H.Bar J.* 114 (1963); 42 *Mich. State Bar J.* 12 (Nov. 1963). In our own State there are governing statutes and court rules (*N.J.S.A.* 22A:2-1 *et seq.*; *R.R.* 4:55-6) some of which deal specifically with mortgage foreclosure proceedings. See *U.S. Pipe, etc. v. United Steelworkers of America*, 37 *N.J.* 343, 355 (1962). Thus *N.J.S.A.* 22A:2-10 provides for allowance in the taxed costs of \$50 for the attorney's "drawing of papers" in foreclosure actions, *R.R.* 4:55-9 provides that in such actions legal fees and charges incurred in procuring title searches may be included in the taxed costs, and *R.R.* 4:55-7(c) provides that in such actions, allowance for legal services in the taxed costs shall be calculated at 3% on the first \$5,000 adjudged to be due the plaintiff, 1½% on the excess over \$5,000 and up to \$10,000, and 1% on the excess over \$10,000. While this is designed towards further defrayment of some of the plaintiff's actual foreclosure costs, it is still not aimed at full compensation for the legal expenses incurred by the plaintiff; the percentages are fixed at low levels (2A *Waltzinger, New Jersey Practice* 28 (1954)), are not related to the actual extent of the legal services performed by the plaintiff's attorney, and are thus applicable even where the foreclosure [fol. 19] is contested or complex. While *R.R.* 4:55-7(c) is part of our current court rules, its counterparts may be found in early statutes and rules of the former Court of Chancery. See *L.* 1902, c. 158, § 91; *Kocher's, Chancery Practice* 74 (1913). The allowance under the rules in the taxed costs is, of course, part and parcel of the plaintiff's judgment in foreclosure. See *R.R.* 4:55-8.

When Congress directed that the government's lien under section 6321 "shall not be valid as against any mortgagee" it did not specifically spell out the elements of the mortgagee's claim entitled to priority. See 26 *U.S.C.A.* § 6323. But it seems entirely clear that at least

principal, interest and costs were within the congressional contemplation. That much is not disputed by the government which set forth in its brief that here "the first and second mortgages were recorded before the federal tax lien was recorded and hence the principal and interest, plus costs of these mortgages are superior to the federal tax lien." And in a report submitted to this Court by the government following the sale of the foreclosed property it set forth the first mortgagee's priority as including principal, interest and taxed costs amounting to \$204.78. This latter sum consisted of filing fees, sheriff's fees and mileage, and \$50 under N.J.S.A. 22A:2-10 for drawing pleadings plus \$100.78 search fees under R.R. 4:55-9. While the government excluded the sum of \$425.52 due the first mortgagee under R.R. 4:55-7(c), we fail to find any sensible basis for differentiating that item from the other items acknowledged by the government. Thus the \$50 item represents services by the plaintiff's attorney as might the \$100.78 item. Without impairing their true character as traditional and incidental costs, the State could readily and conveniently have provided for larger sums, e.g., by statutory or rule provision allowing individual amounts for each of the pleadings filed or each of the steps taken. In their aggregate these could well have exceeded those provided by the modest percentages fixed in R.R. 4:55-7(c) and, for present purposes, it would appear wholly immaterial which of these courses the State has chosen in dealing with its allowance of taxed costs.

The government continues its reliance on *Buffalo Savings, supra*, and *Pioneer, supra*, but these cases involved different situations. In *Buffalo Savings* the mortgage was executed in 1946, the government's lien was filed in 1953, and thereafter in 1957 and 1958 local liens for unpaid real estate taxes attached to the property. On foreclosure, the trial court directed that the local real estate taxes be paid as part of the expenses of sale prior to the satisfaction of the government's lien. This was reversed by the Supreme Court in a *per curiam* which pointed out that "the state may not avoid the priority rules of the federal tax lien by the formalistic device of

characterizing subsequently accruing liens as expenses of sale." 374 U.S. at 229, 9 L.Ed. 2d at 284. Here we are not dealing with any formalistic device or any circumvention of federal priority but with a traditional and incidental allowance by way of taxed costs for services which were truly part of the plaintiff's actual legal costs and expenses in foreclosing its mortgage. Indeed it may be assumed that its actual foreclosure expenses here exceeded its taxed costs. Its efforts in pursuing the foreclosure through sale have benefited not only the mortgagees but the government as well. In a fair sense, it has produced a fund from which the government will receive a return without any expenditure on its own part. It would therefore appear that not only are the significant [fol. 21] legal considerations unfavorable to the government's position here but so also are the equitable ones. See *Washington Const. Co. v. United States of America*, 75 N.J. Super. 536 (Ch.Div. 1962); *Smith v. Smith*, 78 N.J. Super. 28 (Ch.Div. 1963); but cf. *United States v. Pioneer American Ins. Co.*, *supra*, 374 U.S. at 92, 10 L.Ed.2d at 777 u. 13; *Camptown Savings & Loan Assn. v. United States, etc.*, 85 N.J. Super. 18, 20 (App.Div. 1964).

In *Pioneer* the holder of a note and mortgage instituted foreclosure proceedings in a state court. The note was in the face amount of \$20,000 and contained a provision that in the event of court proceedings the mortgagor would pay "a reasonable attorney's fee." The foreclosure decree fixed the attorney's fee at \$1250 and "after satisfaction of court and foreclosure sale costs" the mortgagee was accorded first priority for principal, interest and the attorney's fee. The Supreme Court, in holding that the federal tax lien under section 6321 was entitled to priority over the attorney's fee, found the latter to be inchoate rather than choate. See *Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L.J. 905, 911 (1954); *Note, Federal Priorities & Tax Liens*, 63 Colum.L.Rev. 1259, 1264 (1963). Among other matters, it pointed to the fact that the mortgagee was obligated to pay a "reasonable" fee, that this related

"to the service to be performed by the attorney," and that it could not be "finally fixed in amount" until the date of the decree. 374 U.S. at 87, 90-91, 10 L.Ed. 2d at 773-774, 776.

Pioneer did not deal with any item of taxed costs allowed by statute or court rule but with a contractual agreement for the payment of a fee. Cf. *Burgen Builders, Inc. v. Horizon Developers, Inc.*, 44 N.J. 435 (1965). [fol. 22] That contractual agreement provided, not for a fixed percentage as in *Security Mortg. Co. v. Powers*, 278 U.S. 149, 73 L.Ed. 236 (1928) (and as in our R.R. 4:55-7(c)), but for a reasonable fee which could not be ascertained until all of the legal work had been done and the final decree was about to be entered. While *Security Mortgage* dealt with a bankruptcy proceeding, it is to be noted that there Justice Brandeis remarked that "the lien was not inchoate" but "had already become perfect when the principal note and the loan deed serving it were given." 278 U.S. at 156, 73 L.Ed. at 241. See *United States v. Seaboard Citizens Nat. Bank*, 206 F.2d 62 (4th Cir. 1953).

The contours of the Supreme Court's doctrine of choateness remain to be fixed and undoubtedly further pronouncements by that Court will be handed down. See *United States v. Vermont*, 377 U.S. 351, 12 L.Ed. 2d 370 (1964); *Kennedy, From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien*, 50 Iowa L.Rev. 724 (1965); compare *Streeter v. Overfelt*, 202 F.Supp. 143, 146 (D. Mont. 1962), with *First National Bank of Lewistown v. Tilzey*, 238 F.Supp. 750 (D. Mont. 1965). Nothing thus far, including *Pioneer* which contains no discussion whatever on the subject of taxed costs, persuades us that the traditional and incidental allowances in foreclosure proceedings under R.R. 4:55-7(c) are not lawfully and justly entitled to the same priority as that afforded to the mortgage principal and interest.

Reversed and remanded for distribution in conformity with the views expressed in this *per curiam*.

[fol. 23]

IN THE SUPREME COURT OF NEW JERSEY

Appeal Docket No. 4566

Civil Action On Appeal

EQUITABLE LIFE ASSURANCE SOCIETY OF THE
UNITED STATES, PLAINTIFF-APPELLANT

vs.

ALBERT BAGIN, ET AL., DEFENDANTS-RESPONDENTS

MANDATE ON REVERSAL—July 6, 1965

This cause having been duly argued before this Court by Mr. Frank W. Hoak, counsel for the appellant and Mr. Edward J. Turnbach, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Chancery Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court, Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the sixth day of July, 1965.

JOHN H. GILDEA

Clerk of the Supreme Court

[File Endorsement Omitted]

[fol. 24]

IN THE SUPREME COURT OF NEW JERSEY
No. M-36 September Term 1965

[Title Omitted]

ORDER RE ISSUANCE OF MANDATE—Sept. 21, 1965

This matter having been duly considered by the Court, it is ORDERED that the mandate of this court issue with instructions that distribution be withheld of the sum of \$491.69 and that distribution be permitted of the conceded priority adjustment fund.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton this twenty-first day of September 1965.

JOHN H. GILDEA
Clerk

[File Endorsement Omitted]

[fol. 25]

[Clerk's Certificate Omitted in Printing]

[fol. 26]

SUPREME COURT OF THE UNITED STATES

No. 645, October Term, 1965

UNITED STATES, PETITIONER

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE
UNITED STATES

ORDER ALLOWING CERTIORARI—January 17, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of New Jersey is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.